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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 400

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; C. & R. TRANS., INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellee, the Interstate Commerce Commission, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on April 11, 1955, by a three-judge district court convened pursuant to 28 U. S. C.

2284 and 2325, dismissing a complaint seeking to set aside a Commission order. The contested order, which was entered by the Commission on June 7, 1954, under sections 5 and 214 of the Interstate Commerce Act (49 U. S. C. 5 and 314), authorized, subject to certain specified conditions, the acquisition by C. & R. Trans., Inc., of control of Keeshin Freight Lines, Inc., through purchase of capital stock and, through such acquisition, control of several affiliated corporations, and the acquisition by John Ruan of control of the said corporations; and authorized Keeshin Freight Lines, Inc., and certain of its affiliates to refinance their operations through the issuance of preferred stock and notes. C. & R. was incorporated on October 23, 1953, for the purpose of accomplishing this transaction. (60 M. C. C. 175.)

Keeshin Freight Lines, Inc., is a holding company whose assets include the capital stock of three subsidiary corporations which are engaged in motor carrier operations over approximately 15,650 miles of routes in 16 states and the District of Columbia. These routes extend, roughly, between Minneapolis, Des Moines and St. Louis, on the west, and Boston, Providence, New York City, Philadelphia and Washington, on the east, through central states north of the Ohio River. In 1953, the Keeshin companies had gross operating revenues of $13,577,160. The holding company, together with its operating subsidiaries, is

commonly referred to as the Keeshin system. (60 M. C. C. 179–182.)

On January 31, 1946, trustees were appointed under Chapter X of the Bankruptcy Act in the United States District Court for the Northern District of Illinois, Eastern Division, for the reorganization of the Keeshin system. A plan of reorganization was approved by the Court on January 19, 1954. Fruehauf Trailer Company, a major creditor of Keeshin, agreed to furnish a part of the additional financial support necessary under the plan.

Hearings were held on the applications on four days in December, 1953, following which Division 4 of the Commission, in its report and order dated January 29, 1954, denied the applications. (60 M. C. C. 5.) In the concluding paragraphs of the report, the Division stated:

> Fruehauf is not a party applicant in the proceeding. The record is silent as to who controls Fruehauf, its financial condition, its possible affiliations with other carriers, or the affiliations of the person or persons who control it. Under the circumstances here, and under the terms and conditions of this transaction, complete information on these matters and the joinder of Fruehauf as a party applicant as one of the real parties in interest, are necessary to any affirmative determination of the issues presented.

> We find that the proposed transaction has not been shown to be consistent with the public interest, and that the application, accordingly, should be denied. (60 M. C. C. 27.)

On March 25, 1954, Fruehauf filed an application under section 5 of the Interstate Commerce Act for authority to become a party applicant in the proceedings, and, in order to obtain a determination as to whether it was a material party to the application, pursuant to the usual and accepted practice, filed with the Commission at the same time a petition seeking to be dismissed as a party applicant. In its petition, Fruehauf alleged that its interest in the plan of reorganization and in the application before the Commission was solely that of a creditor, seeking to protect its financial position, that it had no desire to control Keeshin, and sought no voice in its management. (60 M. C. C. 174.)

At the request of applicants, the proceeding was reopened by the Commission for further hearing and reconsideration. Further exhaustive hearings were held on three days in April 1954, during which Fruehauf's connection with the transaction was explored fully. The entire Commission issued its report and the order which is now under attack on June 7, 1954. (60 M. C. C. 173.) The Commission approved the acquisition of control of Keeshin by C. & R. and John Ruan under prescribed conditions and lim-

itations and dismissed Fruehauf as a party to the proceeding; it also authorized issuance by Keeshin of securities and notes in specified amounts. The Commission in its report concluded in part:

> Fruehauf disavows any intention or desire to control, or to participate in the control or management of the Keeshin companies. Our findings herein, and dismissal of its application, will be on the basis that it will not do so, and conditions will be imposed designed to insure, so far as possible, the complete independence of these carriers from such control or influence, or of affiliation with Denver Chicago Trucking. Further, we shall continue to observe the situation which will evolve from our action herein, and should future circumstances require, we shall not hesitate to take such action as may be necessary under section 5 (7), or otherwise, to insure the independence. (60 M. C. C. 200.)
>
> * * * * *
>
> * * * Obviously, the potential earning power of these carriers in this territory is substantial. While the obligations and fixed charges to be incurred will be heavy, the rehabilitation of the system would clearly be in the public interest, if accomplished. We believe an opportunity should be afforded for that rehabilitation, rather than liquidation, which would almost certainly result if we were to deny the application. The revised terms may properly be approved, and the resulting fixed

> charges to be incurred would not be inconsistent with the public interest. (60 M. C. C. 201.)

Commissioners Mahaffie and Johnson dissented, stating in the conclusion of their opinion that they would find that if the proposed transaction is consummated, Fruehauf "will be one of the persons in control of these carriers as control is defined in the act and, accordingly, would deny the petition to dismiss the application." (60 M. C. C. 206)

On July 12, 1954, appellants herein filed a petition for reconsideration. In an order entered on July 14, 1954, the Commission denied the petition, stating:

> * * * the material matters set forth in the petition have been considered by the Commission and discussed in the said report, and the petition presents no facts or arguments which warrant reconsideration.

Thereupon, the appellants filed this action but did not seek a temporary restraining order or preliminary injunction, and the transaction approved by the Commission was formally consummated about August 1, 1954. Motor carrier operations have been conducted actively by the applicants continuously since that time.

The District Court, in dismissing the complaint, pointed out that it failed to allege that the plaintiffs have suffered or been threatened

with any damage or financial injury, or that any definite legal right of the plaintiffs had been violated, and concluded that they are not parties in interest who may maintain this suit. (Jurisdictional Statement, pp. 20–24)

QUESTION PRESENTED

Whether the District Court erred in dismissing the complaint on the ground that appellants "are not 'parties in interest' who may maintain this suit", where the complaint alleged only that the appellants are common carriers by railroad competing with the motor carriers involved in the areas served and have a direct interest in the enforcement of section 5 of the Interstate Commerce Act and the National Transportation Policy, and failed to allege that appellants have suffered or been threatened with any damage or financial injury, or that any definite legal right of theirs has been violated or that the Commission's order has resulted in any increased competition for them.

ARGUMENT

Appellants allege that the Commission erred in not finding that Fruehauf would be in control of Keeshin, and in not requiring Fruehauf to apply for and obtain Commission approval under section 5 of such acquisition of control. The allegations of the complaint, however, are insufficient

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to show that the appellants have any legal right or standing to challenge the Commission's order. The only allegations in the complaint regarding this subject are those contained in paragraph 20 thereof, in which the plaintiffs allege that they are common carriers by railroad and as such serve the areas and points served by the motor carriers involved and compete with those carriers, and that the plaintiffs have a direct interest in the enforcement of section 5 of the Interstate Commerce Act and the National Transportation Policy.

The complaint fails to allege that either of the plaintiffs has suffered or will suffer any injury or damage by reason of the entry by the Commission of the order under attack; or that any legal right possessed by either of them has been invaded, adversely affected, or threatened by the action of the Commission; or that approval of the applications in question will create or result in any additional motor carrier service in the area involved, or would result or has resulted in any increased competition for the plaintiffs or any loss of business or traffic which they now enjoy. None of the allegations of the complaint, including those set forth in paragraph 20 referred to above, constitute any legal basis for instituting or maintaining this suit. The plaintiffs do not allege that they have any direct interest in the transaction in question, but only that they have a direct interest in the enforce-

ment of section 5 of the Interstate Commerce Act and the National Transportation Policy generally.

The courts have consistently held that the Commission has broader discretionary powers in deciding section 5 applications, such as this one, than those under other sections of the Interstate Commerce Act. *Virginia Stage Lines* v. *United States,* 48 F. Supp. 79, 82; *O. C. Wiley & Sons* v. *United States,* 85 F. Supp. 542, affirmed *per curiam* 338 U. S. 902.

Moreover, the complaint does not allege that the findings of the Commission are inadequate or that they are not supported by substantial evidence; nor does it allege that there was no rational basis for the Commission's approval of the applications, nor that the Commission acted arbitrarily or capriciously. In substance the only errors which the complaint alleges that the Commission committed are the dismissal of Fruehauf as a party applicant, and in the approval of the applications, which actions the appellants contend constituted violations of section 5 of the Interstate Commerce Act (49 U. S. C. 5). (Paragraphs 17 and 18 of the complaint, Jurisdictional Statement, pp. 33, 36 and 37.)

Section 1 (20) of Part I of the Interstate Commerce Act, concerning the regulation of railroads, states in part:

> Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19)

> of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest * * *.

Section 205 (g) of Part II of the Interstate Commerce Act, pertaining to the regulation of motor carriers, provides:

> Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I.

In order to maintain a suit to set aside an order of the Commission it is essential that the complaint show that the complainant has suffered, or has been threatened with, some legal injury to it by reason of the Commission's action. The mere fact that the complainant intervened in the Commission proceeding does not entitle it to maintain such suit in the absence of actual or threatened injury. *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 281 U. S. 479, 486; *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, 255. The complaint must disclose that some definite legal right possessed by the complainant is seriously threatened, or that the action complained of may directly and adversely affect complainant's welfare. *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47, 51–

52; *Pennsylvania R. Co.* v. *United States, et al.*, 40 F. (2d) 921, 925. Cf. *Baltimore & Ohio R. Co., et al.* v. *United States, et al.*, 264 U. S. 258.

In their arguments before the lower court, and also in their jurisdictional statement filed here, the appellants have relied heavily upon the decision of this Court in *Alton Railroad* v. *United States*, 315 U. S. 15, in which it was held that the plaintiffs there had standing to maintain the action. We submit that there are marked distinctions between that case and this one, as we shall hereinafter point out.

The *Alton* case involved an attack upon an order entered by the Commission granting a certificate of public convenience and necessity to John P. Fleming Driveaway Service, under the so-called "grandfather" clause of Part II of the Interstate Commerce Act (49 U. S. C. 306 (a)), authorizing that motor carrier to engage in the transportation of automobiles from Detroit, Michigan, to all points in California, New York, Pennsylvania, Tennessee, Washington, Oregon, Kentucky, North Carolina, Texas, South Carolina, and Georgia. The Commission had authorized these extensive operations although it had found in its report that the applicant had shown that it had transported between January 1, 1934 and June 1, 1935, only from one to seven shipments to each of those states. The plaintiff railroads contended that the Commission was without authority to permit the applicant to serve these entire states

when it had actually transported traffic to only a very limited number of points in each of them prior to the "grandfather" date, and that the authority granted should be restricted accordingly.

The instant case, on the other hand, involves an attack upon an order entered by the Commission under sections 5 and 214 of the Interstate Commerce Act (49 U. S. C. 5 and 314), which had authorized acquisition by a corporation of control of a motor carrier then in operation and the issuance of certain securities and notes in connection therewith. The entry by the Commission of the order complained of did not tend to expand the existing motor carrier authority, or to grant any additional authority. It merely permitted the applicants to acquire control of existing motor carriers, without resulting in any additional motor carrier service in the area involved, or in any increased competition for the appellants.

Thus, the order in the *Alton* case was entered under section 206 (a) of the Act, and involved a specific grant of authority which had the effect of enabling the applicant to expand its operations greatly beyond the limited points it was then serving, whereas the order in the instant case was entered pursuant to sections 5 and 214 of the Act *and was only a permissive order,* and did not create any new motor carrier rights or intensify competition for the plaintiffs. More-

over, there is a marked difference between the complaint in the *Alton* case and the complaint in this case. For instance, in paragraph 7 of the complaint in the *Alton* case, (pp. 4 and 5 of transcript filed in this Court), it was alleged that the appellants "are prejudiced and injured by said report and order." No such allegation appears in the complaint in the instant case.

The differences between the two cases are obvious, and the *Alton* case is not controlling here. Although the decision in that case was rendered subsequent to the decisions of the Supreme Court in *Pittsburgh & W. Va. Ry. Co.* v. *United States, et al., supra; Alexander Sprunt & Son* v. *United States, supra; Edward Hines Trustees* v. *United States, et al.,* 263 U. S. 143, and other cases in which complaints were dismissed because of plaintiffs' lack of legal interest or standing to sue, the *Alton* decision does not reject or nullify the latter decisions. Also see *L. Singer & Sons* v. *Union Pacific R. Co.,* 311 U. S. 295; *Boston Tow Boat Co.,* v. *United States,* 321 U. S. 632; *Moffatt Tunnel League* v. *United States,* 289 U. S. 113.

In sum, this Court has held that competitors have standing to challenge Commission orders only where they allege that the order inflicted some direct financial injury upon them, as in *Baltimore & Ohio R. Co., et al.* v. *United States, et al.* (*The Chicago Junction case*), *supra,* or where the order permitted *new* competition to

enter the field, as in *Alton Railroad* v. *United States, supra.* The Court never has held that standing to challenge an order permitting a combination of existing carriers, but without increasing their operations, can be predicated on the mere fact that the complainant competes with the combined carriers. Appellants' complaint alleged only that they were competitors of the carriers involved, but not that they had suffered damage. That was insufficient to give them standing.

The appellants lay great stress upon the fact that the Commission, in *Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines, Inc.,* 57 M. C. C. 467, 471–472, permitted railroad protestants to intervene and present evidence in the proceeding on a section 5 application. The Commission's action in that case does not lend any support to appellants' position, for this Court said in *Pittsburgh & W. Va. Ry. Co.* v. *United States, supra,* at page 486, that "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened injury to it." Moreover, in the *Pacific Intermountain Express Co.* case, *supra,* a complete unification of existing carriers was proposed.

Here, the appellants' attack upon the Commission's order assumes that the Commission erred in finding that the proposed transactions would

not place Fruehauf in control of Keeshin. It further assumes that the Commission will not, contrary to its express assertion, take effective action under section 5 to prevent any unauthorized assumption or exercise of such control by Keeshin in the future. Upon the basis of these assumptions, the appellants speculate that they may be injured in unspecified respects in the indefinite future. We submit that such assumptions and speculations do not provide appellants with standing to challenge the Commission's order.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct, and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted.

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